Petition

81-665

No. ____

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

UNION PLANTERS
NATIONAL BANK OF MEMPHIS, *Petitioner,*

v.

J & C COLOR INDUSTRIES, INC., PROFIT SHARING PLAN; J & C COLOR INDUSTRIES, INC., PENSION PLAN; EDWARD L. BROWN, for the use and benefit of PLASTICOLOR UNLIMITED PROFIT SHARING PLAN, and EDWARD L. BROWN, and wife, ANN CALLAHAN BROWN, *Respondents.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTIONS PRESENTED

1. May the subject matter jurisdiction of a federal bankruptcy court be waived by a party?

2. Does a federal bankruptcy court have subject matter jurisdiction to adjudicate a claim by one creditor that a constructive trust should be imposed upon a fund held by another creditor?

PARTIES INVOLVED

The only parent corporation of petitioner Bank is Union Planters Corporation. All of petitioners's subsidiaries and other affiliates are: Hickory Hill Union Planters; Automated Financial Systems, Inc.; Madison Loan & Thrift; Madison Mortgage Company; Risk Management, Inc.; Planters Life Insurance Corporation; Planters Business Trust; Indianapolis Business Trust; Planters Agricorp; Madison Business Trust; Chickasaw Capital Corporation; Boyle Mortgage Company.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioner, Union Planters National Bank of Memphis, respectfully prays that a writ of certiorari issue to review the judgment order entered by the United States Court of Appeals for the Sixth Circuit on July 7, 1981.

OPINIONS OF THE COURTS BELOW

The opinions of the Court of Appeals, of the District Court for the Western District of Tennessee, Western Division, and of the Bankruptcy Court, are not reported. Each appears in the Appendix hereto, at pp. 1a through 33a.

JURISDICTION

This Court's jurisdiction is invoked under 28 U.S.C. §1254(1). This Petition for Certiorari is filed within ninety (90) days after July 7, 1981, when the judgment order below was dated and entered by the United States Court of Appeals for the Sixth Circuit.

RULES OF BANKRUPTCY PROCEDURE INVOLVED

Rule 915(a): Waiver of Objection to Jurisdiction. Except as provided in Rule 112 and subject to Rule 928, a party waives objections to jurisdiction of an adversary proceeding or a contested matter and thereby consents to such jurisdiction if he does not make objection by a timely motion or answer, whichever is first served.

Rule 928: Jurisdiction Unaffected. These rules shall not be construed to extend or limit the jurisdiction of the courts of bankruptcy over subject matter.

STATEMENT OF THE CASE

This litigation arose out of a 1973 business transaction between the respondents, J & C Color Industries, Inc., et al ("J & C Color"), and two now-bankrupt real estate developers, William M. Bell, Jr. ("Bell") and J. Everett Norfleet ("Norfleet").

In 1973, Bell and Norfleet formed a limited partnership to develop Hickory Hill Industrial Park in Memphis, Tennessee, financed by a $10,600,000 first mortgage loan from petitioner, Union Planters National Bank of Memphis ("Union Planters"). The bank agreed to release individual lots from its mortgage when Hickory Hill repaid Union Planters 75¢ per square foot for each lot released.

In mid-1973, Hickory Hill sold four lots to J & C Color. The deal was structured to require J & C Color to pay only 40¢ per square foot for the undeveloped lots, and 35¢ per square foot additional for site improvements, primarily to avoid a tax reassessment of the entire park based on 75¢ per square foot. Hickory Hill obtained the bank's approval for the "split-price" concept, and sold the four unimproved lots to J & C Color for $69,696.00 (40¢ per square foot).

Hickory Hill gave J & C Color a warranty deed, knowing that the property was mortgaged to the bank; yet releasing the mortgage was not even discussed at the closing. Union Planters was not even advised of the closing for several weeks. Thereafter, Union Planters repeatedly requested Hickory Hill to remit the proceeds to the bank in repayment of the loan. The bank finally received the $69,696 proceeds, and reduced the loan balance accordingly, five months later.

Not until 15 months after the closing did anyone ask Union Planters to release the lots from its mortgage. The bank refused because it had not been paid the required 75¢ per square foot. A month later (April 28, 1975), Hickory Hill filed a Chapter XI Petition in Bankruptcy. Bell and Norfleet, individually, each filed separate Chapter XI proceedings on June 1, 1976.

Subsequently, in October, 1975, Union Planters foreclosed its mortgage after obtaining permission of the Court and after notifying everyone with recorded interests in the property. J & C Color then commenced negotiations with the bank, which continued, sporadically and unsuccessfully, into early 1977. In May, 1977, J & C Color filed suit in a Tennessee Chancery court against Bell, Norfleet and Union Planters, alleging that Bell and Norfleet falsely warranted title to the four lots conveyed,

that Union Planters had agreed to release its mortgage and failed to do so, and that Union Planters was a constructive trustee of the $69,696. Union Planters answered, but Bell and Norfleet obtained an injunction from the Bankruptcy Court enjoining the Chancery Court action against them.

J & C Color then sued Bell and Norfleet alone in Bankruptcy, seeking to bar discharge of Bell's and Norfleet's alleged breach of warranty debt because of fraud. The special committees of creditors for Bell and Norfleet ("special committees") intervened; filed an answer and counterclaim against J & C Color; and joined the bank as a third-party defendant.

In January, 1978, Union Planters unsuccessfully objected to bankruptcy jurisdiction; and later moved to enjoin J & C Color from proceeding further in the Chancery Court, in order to avoid litigating the issues in two separate forums. At the same time, Bell and Norfleet sued the bank for indemnity in the Bankruptcy proceeding. J & C Color did not make any claim, however, against Union Planters in the Bankruptcy proceeding.

The case was tried in late July and early August, 1978. At no time (until well after trial) did J & C Color make any claim against the bank. The first hint that such a claim was even contemplated in the bankruptcy proceeding was the following conclusory assertion made in J & C Color's post-trial brief:

> It is respectfully submitted that the third-party defendant, Union Planters National Bank of Memphis, is liable to [J & C Color] for indemnity for all amounts [Bell and Norfleet] are required to pay to [J & C Color] in this case. Respectfully submitted, . . .

Union Planters promptly filed a post-trial brief which objected to litigating new claims without the benefit of trial;

set out the claims which *had* been pleaded and tried, and addressed their merits; reiterated the bank's contention that the Bankruptcy court lacked subject matter jursidiction over its controversy with J & C Color. Union Planters also asserted undue prejudice if the still-unpleaded claim were to be decided without benefit of trial.

Five months later, on February 2, 1979, the Bankruptcy Judge filed a 15-page memorandum opinion (Appendix, pp. 1a-16a) which rejected J & C Color's objection to discharge (and ignored all other claims pleaded and tried before him), but determined that J & C Color was entitled to recover $69,696 from Union Planters pursuant to the "legal (sic) doctrine of constructive trusts as that doctrine is recognized and applied in Tennessee law." (Appendix, p. 2a). Incredibly, the bankruptcy judge also decided to permit J & C Color to amend its pleadings to conform "to the relief granted," despite the fact that it had never asked for permission to do so. J & C Color, of course, promptly complied, and Union Planters promptly objected again to jurisdiction and moved to strike the amendment.

In the meantime, however, the Bankruptcy court entered judgment, and set a hearing on the bank's motion and objections for a date *after* the time ran within which Union Planters could appeal the judgment. After Union Planters timely appealed, the Bankruptcy court then ruled that the bank's appeal had deprived the Bankruptcy court of jurisdiction to hold the hearing.

The appeal to the District Court was tried on the Bankruptcy record at a hearing held on September 26, 1979. On January 9, 1980, the District Court filed a 9-page memorandum opinion (Appendix, pp. 17a-25a), concluding that the Bankruptcy Judge had been "correct as a matter of law and must be affirmed."

On appeal to the Sixth Circuit, the Court of Appeals, by Per Curiam order, summarily affirmed the judgment of the District Court. In its opinion, the Court of Appeals held that the controversy between the bank and J & C Color was "related to the 'matters pertaining to bankruptcy'" and that Union Planters waived any objection to the jurisdiction of the Court.

REASONS FOR GRANTING THE WRIT

1. The Decision Below That Subject-Matter Jurisdiction Can Be Waived Is Clearly In Conflict With Prior Decisions By That Court, Other Courts Of Appeals, And This Court.

In holding that Union Planters waived its rights to object to jurisdiction, the Court of Appeals relied upon Rule 915(a) of the Bankruptcy Rules (as in effect in 1978) which provides:

> Except as provided in Rule 112 and subject to Rule 928, a party waives objection to jurisdiction of an adversary proceeding or a contested matter and thereby consents to such jurisdiction if he does not make objection by a timely motion or answer, whichever is first served.

Such reliance ignores official comments to Rule 915(a) which make it clear that the Rule does not apply to subject-matter jurisdiction:

> Nor does the rule apply to the making of an objection to the court's jurisdiction over a controversy that does not arise in the course of or relate to the administration of the estate of an adjudicated bankrupt or his discharge. See Rule 928.
>
> Fed.R.Bankruptcy 915, Adv. Comm. Note (a)(1976).

As a leading treatise writer states:

> The Rule [915(a)] does not purport to confer jurisdiction to (sic) the court over . . . any con-

> troversy of which the court does not have subject-matter jurisdiction.
>
> 1976 Collier Pamphlet Edition, Bankruptcy Rules, p. 991.

The holding below also disregards the clear mandate in Bankruptcy Rule 928:

> These rules shall not be construed to extend or limit the jurisdiction of courts of bankruptcy over subject matter.

That a party cannot waive federal subject matter jurisdiction is elementary and, until the decision below, indisputable. *See, e.g., Mitchell* v. *Maurer*, 293 U.S. 237, 55 S.Ct. 162, 79 (1934); *Sligh* v. *Doe*, 596 F.2d 1169 (4th Cir. 1979); *In Matter of Erie Lackawanna R.Co.*, 563 F.2d 784 (6th Cir. 1977); *Rauch* v. *Day and Night Mfg. Corp.*, 576 F.2d 697 (6th Cir. 1978); and *First State Bank, etc.* v. *Sand Springs State Bank*, 528 F.2d 350 (10th Cir. 1976).

As the Tenth Circuit squarely held in *First State Bank, supra*, 528 F.2d at 354:

> We are cognizant that the parties agreed to submit the subject controversy for disposition by the Bankruptcy Court, notwithstanding the prior challenges to its jurisdiction. Parties cannot confer subject matter jurisdiction upon a federal court by agreement, waiver or consent.

The Court below held squarely to the contrary:

> [T]he plaintiffs' argument that Union Planters waived any objection to the court's jurisdiction has merit. (Appendix, p. 50).

Some thirty years ago this Court stated, in a related context:

> As prompt, economical and sound administration of justice depends to a large degree upon definite and

> finally accepted principles governing important areas of litigation, such as the respective jurisdiction of federal and state courts, we granted certiorari.
>
> * * *
>
> The jurisdiction of the federal courts is carefully guarded against expansion by judicial interpretation or by prior action or consent of the parties. To permit a federal trial court to enter a judgment in a case removed without right from a state court where the federal court could not have original jurisdiction of the suit even in the posture it had at the time of judgment, would by the act of the parties work a wrongful extension of federal jurisdiction and give district courts power the Congress had denied them.
>
> *American Fire & Casualty Co.* v. *Finn*, 341 U.S. 6, 8, 17-18, 71 S.Ct. 534.

Identical considerations warrant grant of the writ of certiorari in this case.

2. The Decision Below Squarely Conflicts With A Decision Of The Tenth Circuit Court Of Appeals As To What Constitutes A "Matter Pertaining To Bankruptcy" Which Is Within The Subject-Matter Jurisdiction Of A Bankruptcy Court.

The Court of Appeals held that the controversy between Union Planters and J & C Color was related to "matters pertaining to bankruptcy" because the bankrupts (Bell and Norfleet) were "allegedly jointly liable with Union Planters to the plaintiffs for damages arising out of the controversy." (Appendix, p. 32a-33a). The ostensible basis for this decision was the original complaint filed by J & C Color in the Chancery Court of Shelby County, Tennessee. (Appendix, p. 27a). However, this determination ignores the fact that the controversy between J & C Color and Union Planters is con-

cerned with whether a constructive trust for the benefit of J & C Color may be imposed upon a fund held by Union Planters in which the trustee (creditors' committees) claimed no interest whatsoever.

The Tenth Circuit, in *First State Bank, etc.* v. *Sand Springs State Bank, supra,* has clearly held, on virtually identical facts, that the Bankruptcy Court has no subject matter jurisdiction over such controversies. In that case, the trustee for several related corporations in reorganization proceedings under Chapter X possessed certificates of deposit issued to the debtors by several banks. A person named Guthrie claimed to own the certificates and asked the Bankruptcy Court to determine the trustee's interest in them. The issuing banks (also creditors of the estate) opposed Guthrie's application (some of them challenging jurisdiction), and claimed the certificates for themselves. The banks then proceeded to litigate the issues. The lower court ruled in favor of the banks and against Guthrie, and he appealed. The Tenth Circuit raised the question of subject matter jurisdiction on its own motion and reversed for lack of it. The court held that it would have been possible to administer the estate of the debtor without the court's assumption of jurisdiction because the only effect which the controversy would have on the bankrupt estate would be bookkeeping entries reducing the claim of the successful party; thus, the controversy did not relate to "matters pertaining to bankruptcy." *First State Bank, etc.* v. *Sand Springs State Bank, supra,* 528 F.2d at 353-354. *See also, Penn. Central Transp. Co.* v. *Irving Trust Co.,* 594 F.2d 952 (3rd Cir. 1979), (reversing a Bankruptcy Court's exercise of jurisdiction over an escrow fund in which the debtor had no real interest).

Precisely the same situation is presented by the instant case. If J & C Color ultimately prevailed in the Chancery proceedings, its bankruptcy claim would be reduced by that recovery. If J & C Color loses the Chancery lawsuit, even the amount of the filed bankruptcy claim could not be affected.

Whether or not a controversy, the outcome of which can only effect a modification in the amount of a bankruptcy claim, is within federal bankruptcy jurisdiction is an important issue affecting the respective jurisdictions of federal and state courts. A writ of certiorari should issue to resolve the conflict between the Tenth and Sixth Circuits on this issue.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Sixth Circuit.

Respectfully submitted,

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APPENDIX

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

NO. BK-76-1007
NO. BK-76-1008

IN RE:

J & C COLOR INDUSTRIES, INC.,
PENSION PLAN, *et al.*,

Plaintiffs,

v.

WILLIAM M. BELL, JR. and
J. EVERETT NORFLEET

Defendants,

v.

UNION PLANTERS
NATIONAL BANK OF MEMPHIS

Defendant.

Memorandum Opinion

APPEARANCES:

William W. Dunlap, Jr., Esq.
John R. Dunlap, Esq.
James W. McDonnell, Jr., Esq.
James S. Gilliland, Esq.
Thomas W. Bell, Jr., Esq.
Oscar C. Carr, III, Esq.

ODELL HORTON, BANKRUPTCY JUDGE

The crucial issue to be decided by the Court is whether the defendants, William M. Bell, Jr., and J. Everett Norfleet, partners in Bell & Norfleet, obtained money, $69,696.00, from plaintiff, J & C Color Industries, Inc., Pension Plan, et

al, by false pretenses and false representations in violation of Section 17a(2) of the Bankruptcy Act of the United States:

1.) When William M. Bell, Jr., and J. Everett Norfleet, in consideration of $69,696.00, signed and delivered to plaintiff two warranty deeds dated January 4, 1974, conveying title to four parcels of realty, lots 35, 36, 37 and 38, Hickory Hill Industrial Park, warranting title to the lots to be unencumbered, and

2.) When in truth and in fact lots 35, 36, 37 and 38 as well as all 547 acres in Hickory Hill Industrial Park were, on January 4, 1974, encumbered by the lien of a master mortgage held by Union Planters National Bank of Memphis, Tennessee, and two other participating banks, securing an indebtedness of $10,600,000.

The Court concludes from all of the evidence that William M. Bell, Jr. and J. Everett Norfleet did not obtain money, $69,696.00, from J & C Color Industries, Inc., Pension Plan, et al, by means of false pretenses or false representations and thus did not violate Section 17a(2) of the Bankruptcy Act. The Court does find, however, as will be later explained, that J & C Color is entitled to recover $69,696.00 from Union Planters National Bank of Memphis, Memphis, Tennessee, pursuant to the legal doctrine of constructive trust as that doctrine is recognized and applied in Tennessee law.

Bell & Norfleet, a partnership, composed of William M. Bell, Jr., and J. Everett Norfleet, ventured into the development of a 547 acre industrial park in Memphis, Tennessee, known as Hickory Hill Industrial Park.

Hickory Hill Industrial Park, a limited partnership, was financed by a consortium of three banks, First National Bank of Boston, Boston, Massachusetts, First National Bank of Miami, Miami, Florida and Union Planters National Bank of Memphis, Memphis, Tennessee, the lead bank.

The consortium of banks held a properly recorded first mortgage lien on the entire 547 acres of Hickory Hill Industrial Park (HHIP) which secured an indebtedness of

$10,600,000. The master mortgage contained a release provision whereby the banks agreed to release lots sold to purchasers upon payment to Union Planters National Bank of Memphis (Bank) of $0.75 cents per square foot, the price agreed upon by the Bank and Bell & Norfleet.

Plaintiff, Edward L. Brown, acting on behalf of J & C Color Industries, Inc., (J & C Color) approached Jim Pirtle, an employee in the Real Estate Department of Bell & Norfleet, about purchasing lots in the commercial subdivision. After some negotiations, Brown agreed to purchase four one acre lots in HHIP. The lots, substantially undeveloped at the time, were identified as lots 35, 36, 37 and 38.

The agreement between the parties was expressed in two contracts both dated August 16, 1973. The first contract, Exhibit #1, was for the sale and purchase of lot 35 for a price of $17,424.00. The second contract was for the sale and purchase of lots 36, 37 and 38 for a sale price of $52,272. The total consideration for the four lots was $69,696.00, based upon a price scale of $0.40 cents per square foot, rather than $0.75 cents per square foot as stated in the recorded mortgage.

By warranty deeds dated January 4, 1974, Hickory Hill Industrial Park by William M. Bell, Jr. and J. Everett Norfleet, for Bell & Norfleet, conveyed title to lots 35, 36, 37 and 38 to J & C Color Industries, Inc. Pension Plan. The consideration paid was $69,696.00. The warranty deeds, recorded in the Register's Office of Shelby County, Tennessee, on January 9, 1974, contained a clause warranting title to the lots to be "unencumbered."

In November of 1975, due to default in payment on its mortgage by Bell & Norfleet, Union Planters National Bank of Memphis, (Bank) with leave of the Bankruptcy Court, foreclosed on Hickory Hill Industrial Park. J & C Color received notice of the foreclosure proceedings in bankruptcy but did not appear in the Bankruptcy Court. The Bank did not notify or inform the Bankruptcy Court during the hearings of or about the recorded warranty deeds conveying the four lots to

J & C Color. As a result of foreclosure by the Bank, J & C Color lost lots 35, 36, 37 and 38. It also lost the $69,696.00 in cash it had paid Bell & Norfleet for the lots.

It is admitted by all of the parties to this proceeding that the four lots Bell & Norfleet conveyed to J & C Color on January 4, 1974, and the entire 547 acre Hickory Hill Industrial Park were, on that date, encumbered by the lien of a master mortgage held by Union Planters National Bank of Memphis. The mortgage, recorded in the Register's Office, Shelby County, Tennessee, was security for a $10,600,000 financing agreement on Hickory Hill Industrial Park.

J & C Color alleges in its complaint that William M. Bell, Jr. and J. Everett Norfleet and Bell & Norfleet, obtained its money, $69,696.00 by false pretenses and false representations in violation of Section 17a(2) of the Bankruptcy Act, in that:

> Bell & Norfleet, acting through its agents, servants and employees, represented to J & C Color that it owned lots 35, 36, 37 and 38, Hickory Hill Industrial Park, free and clear of all encumbrances and conveyed those lots to J & C Color by warranty deeds dated January 4, 1974, in consideration of $69,696.00 which J & C Color, in reliance upon those representations and warranties, paid in cash, and Bell & Norfleet then knew lots 35, 36, 37 and 38 and the entire 547 acres of Hickory Hill Industrial Park were in fact encumbered on January 4, 1974, by the lien of a master mortgage held by Union Planters National Bank of Memphis.

William M. Bell, Jr. and J. Everett Norfleet both deny that they obtained money in the sum of $69,696.00 from J & C Color by means of any false pretenses or false representations. Both men assert that they, at all times throughout this series of transactions, acted in complete good faith and in reliance upon an oral agreement they had with Union Planters National Bank of Memphis.

Testimony presented at the hearing showed that J & C Color's offer, made at a time when development of HHIP had just begun, caused some excitement within the Bell & Norfleet organization.

Bell testified that, after learning of the offer by J & C Color, he conceived immediately the possibility of using the offer by J & C Color to purchase four one acre lots as a property tax saving opportunity for Bell & Norfleet which could be realized by splitting the $0.75 cents per square foot sales price into two parts, that is, (1) purchase price and (2) development cost.

Bell, with J. Everett Norfleet and Wilson Viar, Bell & Norfleet's in-house legal counsel, and possibly others present, telephoned John David Guthrie, the loan officer in Union Planters National Bank charged with the responsibility of servicing the Bank's loan. Bell stated to Guthrie his proposal to split the sales price into two parts, purchase price and development cost. While there was some doubt in witnesses minds, a speaker attached to Bell's telephone was probably on for all present in Bell's office to hear the conversation with Guthrie.

Bell testified that after reaching agreement with Guthrie, he instructed Viar to draft the necessary legal documents. While Viar testified that he did not recall any such specific instructions, he knew the next step and passed the matter to his legal assistant, C. Hendricks, who drafted the papers.

To further implement the Bell tax saving idea, Bell & Norfleet's real estate agent; Jim Pirtle, drafted two contracts covering sale of the lots, one contract for the $0.40 cents per square foot sales price and the second contract for $0.35 cents per square foot development cost. To complicate this hydra-headed transaction further, J & C Color not only made an earnest money deposit of $3,000.00 cash with each of the two contracts but also for some reason loaned Bell & Norfleet $45,000.00 in cash. The improvement contract provided that if improvements were not made on each lot within one year, then J & C Color would be paid 14% interest by Bell & Norfleet which would have been, in effect, a discount on the purchase price.

John David Guthrie testified that he was at the time a loan officer in the Real Estate Department of Union Planters National Bank. He held the executive rank of Vice President.

In 1973 and 1974, he had responsibility for the Bell & Norfleet loan. The HHIP mortgage secured a loan on 547 acres in the sum of $10,600,000 with an actual loan limit of $7,700,000.

Guthrie testified that Bell telephoned him and presented a "concept" of splitting the purchase price of the four one acre lots into two parts, sales price and development cost. The concept was to lower the sales price and accordingly obtain a lower valuation by the tax assessor of Shelby County. Guthrie stated that Bell wanted to run the concept by the bank as it was unusual. Guthrie said Bell wanted our approval of the concept. It seems, Guthrie testified, that he also ran the concept by another bank officer named Jenkins. We felt, he stated, that it would be a good way to accomplish what they wanted to do. There was, he said, no discussion of specifics, purely a concept. Guthrie said there was never any discussion of a release for $0.40 cents per square foot. He denied that he agreed to release for $0.40 cents per square foot. Guthrie admitted he had several conversations with Wilson Viar and the subject of release was discussed. He said, however, that he did not recall Viar asking him to release for anything less than $0.75 cents. He admitted talking with Hendricks, Viar's legal assistant. Guthrie said he did not recall when he received the contract relating to the closing but believed that he did receive it. He learned about the closing of the sale to J & C Color, he said, about a week thereafter from Viar. His reaction to the fact of closing was to wonder where were the proceeds of the closing. Viar said, according to Guthrie, "we'll get it to you. We don't have it now." Guthrie did not tell Bell & Norfleet not to go forward with the transaction. Guthrie stated the Bank received the $69,696.00 in June, 1974, and that sum represented $0.40 cents per square foot that had been paid by J & C Color to Bell & Norfleet. On cross-examination by counsel for Bell, Guthrie admitted that Bell was asking for approval of the concept and that he did give his approval to that concept.

The testimony of Wilson Viar tended to corroborate the testimony of Bell. Viar testified that he talked with Guthrie. According to Viar, he told Guthrie we want to save real estate

taxes and split the sales price into a raw land price and an improvement cost. Guthrie, according to Viar, stated, "we're gonna accommodate you." According to Viar, there was no question that Guthrie agreed to the release. He said there was no question about the $0.40 cents per square foot sales price. The only question, according to Viar, was how much of the $0.35 cents improvement cost the bank would receive. Viar stated that during the initial conversation between Bell and Guthrie, Guthrie stated, "I know what you guys are driving at. We'll accommodate you."

After the January 4, 1974, closing, Bell & Norfleet did not immediately remit the sales proceeds, or any part of it, to the Bank. That was not done until June of 1974, approximately six months later. According to Viar, that is what baffled him.

Viar, in passing judgment on the whole transaction, testified that it represents an example of "lousy lawyering."

Bell, Viar and Norfleet all testified that Guthrie agreed to the proposal and agreed on behalf of the Bank to release the four one acre lots sold to J & C Color for $0.40 cents per square foot.

According to the testimony of C. Hendricks and Viar, copies of the legal papers evidencing the transaction were forwarded to Guthrie at the Bank for his inspection and approval. The contracts were sent to Bell & Norfleet's "outside attorneys" for closing. The closing attorney was Thomas Dyer.

Bell and Norfleet did not attend the closing in Dyer's office. Brown never met either Bell or Norfleet during the time these events occurred. The testimony was that Bell was out of town. The warranty deeds were signed several days before the closing. Norfleet, at the time he signed the warranty deeds, testified that he asked Viar if everything was in order on the release, and upon being assured by Viar that it was, signed the warranty deeds. Norfleet stated that he told Hendricks and Viar not to close unless we have the release.

Viar could not recall any such inquiry by Norfleet about the release. In fact, Viar testified that if such an inquiry had been made it would have precipitated inquiries about the release deed.

The closing attorney, Thomas Dyer, testified that he could not recall the transaction with any degree of clarity. He vaguely remembered the closing. In fact, Dyer testified that he did not even have a file on the transaction because the contents of his file had slowly disappeared due to many inquiries about the closing.

Dyer testified that the closing was abnormal in that the seller had to bring money to the closing. The only money that changed hands during the closing was approximately $14,000.00 paid by J & C Color, the balance of the purchase price and expenses. The funds previously paid to and loaned to Bell & Norfleet by J & C Color representing the balance of the purchase price were not on the table. Dyer apparently did not question the absence of funds by Bell & Norfleet. Neither did he forward money to the Bank. Further, Dyer stated that he later spoke to Guthrie about the release. Dyer said that he was concerned about the release, wrote Guthrie a letter and sent a release document to Guthrie for execution by the Bank. Thereafter, he heard nothing further from the Bank. Dyer said title was not examined by him as closing attorney but he did not know if that fact was explained to Brown. Finally, Dyer summarized his testimony by stating that actually he could not recall whether he personally attended the closing or not.

Neither attorney, Viar, Hendricks or Dyer, prepared a release deed or any other legal document releasing lots 35, 36, 37 and 38 from the master mortgage. There was no such document at the closing. Yet the warranty deed executed and delivered at the closing contained a provision stating that title was free and clear of any encumbrance. To further confound the mystery, a $4.00 release deed fee was shown on a closing statement.

All the attorneys involved testified that they knew a release deed was a necessary requirement. Viar testified it was Dyer who prepared the master mortgage which included the $0.75 cents per square foot release provision that Bell, Norfleet and Viar testified Guthrie agreed to modify.

J & C Color was not represented by an attorney at the closing. J & C Color was not represented by an attorney at any stage in the series of events which led from the contracts to purchase to the closing. Brown, for J & C Color, testified that he trusted the people at Bell & Norfleet and Hickory Hill Industrial Park. J & C Color did not participate in the conversation between Bell and Guthrie. J & C Color did not, at that point, have any knowledge of Bell's proposal to Guthrie. From all the evidence presented at the hearing, the Court concludes that the objective of Bell was to record warranty deeds in the Register's Office, Shelby County, Tennessee, showing the sale of lots 35, 36, 37 and 38 in Hickory Hill Industrial Park (HHIP) at a price of $0.40 cents per square foot rather than $0.75 cents per square foot. The tax assessment would then be based upon $0.40 cents per square foot. This finding by the Court is further supported by the testimony of Wilson Viar, Bell & Norfleet attorney, who testified that Bell did not want to "hang all that paper" down there in the Courthouse showing a sales price of $0.75 cents per square foot.

Viewing in its totality all of the evidence presented during these protracted hearings, including observing all of the witnesses who testified, reading the exhibits, and marshalling all of the relevant evidence in a rational and coherent manner, the Court is satisfied, in fact convinced, by evidence that is clear, cogent and convincing that John David, Guthrie agreed with and approved the tax saving concept presented to him by Bell. The idea was simply to prevent a reassessment of the realty taxes at a higher rate on Hickory Hill Industrial Park. Bell did not want a tax assessment on a sales price of $0.75 cents per square foot. He wanted the assessment on $0.40 cents per square foot. Guthrie agreed. Guthrie testified that

he did approve the concept. He admitted that he may have checked with someone else in the Bank before informing Bell of his approval. It is obvious, from all of the testimony, that Bell did not move ahead on the contracts with J & C Color until he telephoned Guthrie and obtained Guthrie's approval of what Bell called "a deal." Brown, (J & C Color) was not involved in any of those transactions. He did not know anything about any of the conversations between Bell, Guthrie, Viar, Dyer, Hendricks, Norfleet and Pirtle. Brown never had the advice of a lawyer. Even though he is a successful businessman, Brown showed an amazing degree of innocence and trust in Pirtle and persons associated with the Bell & Norfleet organization. Nothing supports this finding of the Court more than the fact that he willingly loaned Bell & Norfleet $45,000.00 cash after making an earnest money deposit of $3,000 cash on each of the two realty purchase contracts. This Court finds that all of the lawyers, Bell, Norfleet, Bell & Norfleet and the Bank failed J & C Color and Brown.

The Court is satisfied, from all of the evidence that Union Planters National Bank, acting through its employee, Loan Officer John David Guthrie, had full knowledge of and approved proceeding with the contracts to sell, the closing and the conveyance, by warranty deeds, of lots 35, 36, 37 and 38 to J & C Color.

Guthrie's testimony that he approved the concept presented to him by Bell but not it actual implementation appears to the Court, at best, to be seriously anemic. Bell and Norfleet were commercial land developers. They were not university professors teaching courses in commercial land development concepts. Guthrie was, at the time, a ranking Bank officer. When Guthrie tells Bell, "I know what you guys are driving at, we'll accommodate you," that assurance was sufficient for any reasonably prudent businessman to accept as approval. When Bell stated to his colleagues at Bell & Norfleet "we've got a deal," the court is satisfied that was his good faith understanding of Guthrie's message. Guthrie had given his approval. Bell & Norfleet had the green light.

After the closing on January 4, 1974, Guthrie frequently inquired of Bell & Norfleet when the Bank would receive the $69,696.00 proceeds. Bell & Norfleet did not pay the $69,696.00 to Union Planters National Bank until June of 1974, about six months after the closing. With knowledge of the sale of the lots to J & C Color and the recorded warranty deeds, the Bank, when it did receive the funds, credited the $69,696.00 not to the sale of the four lots to J & C Color but rather applied the proceeds on the entire mortgage indebtedness owed to it by Bell & Norfleet on the 547 acre Hickory Hill Industrial Park. The evidence shows that the Bank knew Bell & Norfleet was encountering financial difficulty. Business relations between the Bank and Bell & Norfleet were deteriorating. The Bank stopped funding the HHIP project about August of 1974 when Bell & Norfleet's loan had reached the maximum loan limit of about $7,700,000. Those facts were not known to J & C Color. Thereafter, when the Bank sought to foreclose on its Hickory Hill Industrial Park mortgage, it did not mention the J & C Color warranty deeds to the Bankruptcy Court — even though it had been in some negotiations with J & C Color to resolve the controversy.

The Court finds that the intent of Bell & Norfleet was not to defraud J & C Color. The intent was to obtain a realty tax assessment advantage on Hickory Hill Industrial Park. J & C Color's offer to purchase four lots in that industrial park, at an opportune time, presented that possibility to Bell & Norfleet. Through Guthrie, the Bank gave its approval. However inequitable the totality of events may reveal the Bell & Norfleet plan finally to have been, in its implementation, upon J & C Color, the orchestration of all those events at the time do not add up to obtaining money from J & C Color by fraud or false pretenses.

Section 17a(2) reads:

> "A discharge in bankruptcy shall release a bankrupt from all of his provable debts, whether allowable in full or in part, except such as (2) are liabilities for obtaining money or property by false pretenses or false representations . . ."

Section 17a(2) of the Bankruptcy Act contemplates actual fraud, that the bankrupt knowingly made false representations, that such representations were made with the intent of defrauding the creditor or were made with such reckless disregard for the truth as to be tantamount to a willful misrepresentation and that the creditor relied upon and was misled by the false pretenses or representations. *U.S.* v. *Syros*, 254 F.Supp. 195, 198 (D.C. Mo., 1966).

The burden of proof is on the creditor who questions the dischargeability of its debt and must prove, by clear and convincing evidence, every element of its case. *In re: Barlick*, 1 Bankr. Ct. Dec. 412, *In re: Arden*, 2 Bankr. Ct. Dec. 204. In order to prove all of the elements of actual fraud and come within the exception of 17a(2), J & C Color must establish, 1) that Bell & Norfleet knowingly made materially false representations to it, 2) the representations were made with intent and purpose of deceiving J & C Color, and 3) that J & C Color, relied upon and was misled by the false representations and sustained a loss of its money, $69,696.00, as the proximate result of the representations having been made. *Sweet* v. *Ritter Finance Company*, 263 F.Supp. 540, 543 (W.D., Va., 1967), 1A *Collier on Bankruptcy* S. 17, 16, p. 1634 (14th Ed., 1975). All exceptions to a discharge under 17a(2) must be strictly construed, *Gleason* v. *Thaw*, 236 U.S. 558 (1915).

The facts in this difficult case do not meet the requirements of Section 17a(2) of the Bankruptcy Act. The evidence shows that it was J & C Color who approached Bell & Norfleet. No false representations or false pretenses resulted in J & C Color entering into the contracts with Bell & Norfleet to purchase the four lots. No false representations or false pretenses resulted in J & C Color making the cash earnest money deposits of $3,000 on each of the two contracts. No false representations or false pretenses resulted in J & C Color loaning Bell & Norfleet $45,000 cash in addition to the earnest money deposits. The signing of the warranty deeds by both Bell and Norfleet did not constitute false representations or false pretenses because both men signed the deeds with an under-

standing the Bank had agreed to release the lots in accordance with the "deal" Bell had made with the Bank through Guthrie. The Court therefore concludes that neither Bell or Norfleet or anyone associated with the Bell & Norfleet Enterprises obtained money from J & C Color by means of false representations or false pretenses in violation of Section 17a(2) of the Bankruptcy Act.

The Court does find, however, that J & C Color is entitled to recover its $69,696.00 from Union Planters National Bank of Memphis. Conscience dictates and justice requires no less. The Bank was a participant, by agreement, in the tax saving plan of Bell & Norfleet. Through Guthrie, the Bank agreed with Bell's plan to split the $0.75 cents per square foot sales price for the J & C Color lots into two parts, a $0.40 cents sales price and $0.35 cents development cost. Bell & Norfleet did not proceed to implement the plan until Guthrie gave his approval. The Bank, through Guthrie, knew about the closing. The Bank, through Guthrie, at some point in time examined the contracts and papers prepared by C. Hendricks and Wilson Viar, Bell & Norfleet attorneys. After the closing, Guthrie made inquiries about when the Bank would get the proceeds from that closing. With all that knowledge and participation, when the Bank did receive the funds the crediting was not to the J & C Color purchase but to the entire debt owed the Bank by Bell & Norfleet and the HHHP. Sometime thereafter, the Bank and J & C Color attempted to resolve the matter but that effort failed.

The Court finds that it would be a gross inequity for the Bank to keep the $69,696.00 paid by J & C Color for lots 35, 36, 37, and 38 and, at the same time, benefit from possession and title to the lots gained through foreclosure proceedings. The Court finds the Bank owed Bell & Norfleet and J & C Color a duty to apply those funds, $69,696.00, to the purchase of lots, 35, 36, 37 and 38 and its failure to do so constitutes the violation of a trust.

The Court therefore concludes that Union Planters National Bank accepted the $69,696.00 freighted with a con-

structive trust. The general test for determining the existence of a constructive trust has been stated, in Tennessee law, to be as follows:

> "Such a trust arises contrary to intention and in invitum, against one who, by fraud, actual or constructive, by duress or abuse of confidence, by commission of wrong, or by any form of unconscionable conduct, artifice, concealment, or questionable means, or who in any way against equity and good conscience, either has obtained or holds the legal right to property which he ought not, in equity and good conscience, hold an enjoy — (a constructive trust) is the formula through which the conscience of equity finds expression — when property has been acquired in such circumstances that the holder of the legal title may not, in good conscience retain the beneficial interest, equity converts him to a trustee — a Court of equity in decreeing a constructive trust is bound by no unyielding formula. The equity of the transaction must shape the measure of relief."
>
> *Central Bus Lines* v. *Hamilton National Bank*, 239 S.W. 2d 583, (1951); *Sanders* v. *Forcum-Lannom, Inc.*, 475 S.W. 2d 172 (1972).

The same basic principle is stated in *State* v. *Holland*, 367 S.W. 367 S.W. 2d 791, 795 (1962):

> "Equity will raise a constructive trust when necessary to justify the ends of justice, to prevent a fraud or the commission of a wrong by any form of unconscionable conduct, artifice or concealment or when a person holds the legal title to property he ought not to hold and enjoy."

See also 76 *Am Jur.* 2d, Trusts, Sec. 233, page 456 where the author states:

> "The rule is frequently stated that when money or property is entrusted to another for a certain purpose, such as the payment of a debt, equity implies or imposes a trust that the money or property will be applied to such purpose. It would seem that such a trust can be viewed either as an express one created by the manifestation, by conduct, or an intention to create a trust, or as a constructive trust that will be enforced as against any breach of confidence; at least, a breach of confidence to apply the

> property to the proper purpose giving rise to a constructive trust enforceable against the money or property in question."

In the case of *Wells* v. *Wells*, 556 S.W. 2d 769 (1977) the Court stated on page 771:

> "Constructive or resulting trusts are judge-created trusts or doctrines which enable a Court, without violating all rules of logic, to reach an interest in property belong to one yet titled in and held by another."

The Bank has asserted various affirmative defenses such as res judicata, estoppel, laches, statute of limitations and jurisdiction. While the Court recognizes the principles stated in the cases of *Harrison* v. *Blumfield Industries, Inc.*, 435 F.2d 1192 (6 Cir., 1970), *Scales* v. *Scales*, 564 S.W. 2d 667 (1977) and *A.L. Kormon Company* v. *Metropolitan Government of Nashville*, 391 S.W. 2d 633 (1965), it does not think the Order of the Bankruptcy Court entered on September 24, 1975, established the principles of res judicata or collateral estoppel against J & C Color. Apparently J & C Color received notice of the bankruptcy proceedings as a presumed creditor of HHIP. There was no adjudication on the merits of any causes of action between the Bank and J & C Color. There was no default judgment at that time on the issues presented in this hearing. J & C Color was not before the Court as a party defendant. The Bank, with far more knowledge of these transactions than J & C Color, did not inform the Court of the J & C Color warranty deeds. This Court finds the Bank was silent at a time when it had a duty to speak.

This Court does not think the doctrine of laches applies in this case. As to the Bank, J & C Color has not been guilty of any unexcused delay or negligence. The Bank has not relied in any way to its detriment upon any action of J & C Color. To the contrary, J & C Color attempted to negotiate a settlement with the Bank and thereafter, when that effort failed, filed a civil action against the Bank in the Chancery Court of Shelby County Tennessee.

Neither does the Court think the appropriate statute of limitation bars the relief sought in this case. T.C.A. 28-309 estab-

lishes six years as the period of time applicable to trusts arising by implication of law and constructive trusts.

New York Life Insurance Company v. *Nashville Trust Company*, 292 S.W. 2d 749, 755, 756 (1956) reads that:

> "Most of the cases treating of the hearing of the statute of limitations upon the right to a constructive trust have . . . applied the statute from the date of actual or imputed knowledge by the cestui of the wrongful holding."

It is the Court's opinion that J & C Color acquired knowledge of the Bank's participation in the "deal" with Bell & Norfleet and HHIP during the preparation for and trial of the issues in the Bankruptcy Court.

There is no real issue of jurisdiction in this proceeding in so far as the Bank is concerned. The Bank appeared and participated fully in this entire series of protracted hearings.

From all of the facts and the law as the Court applies the law to these facts, the Court concludes that J & C Color is entitled to receive $69,696.00 from Union Planters National Bank. To accomplish that result, the Court will enter an appropriate Order. The Court is not unaware the Bank has suffered a severe financial loss in its dealing with Bell & Norfleet and HHIP. However, in its dealing with Bell & Norfleet and HHIP, the Bank assumed a risk of loss. That fact cannot deter justice for J & C Color.

In accordance with Rule 15(b) Federal Rules of Civil Procedure, the Court will permit counsel for J & C Color to amend its pleadings to conform to the evidence adduced at the hearing and to the relief granted by the Court. Further, all parties to this proceeding are requested to submit appropriate orders to the Court for entry within ten days of the date of entry of this memorandum.

The foregoing findings of fact and conclusions of law are hereby entered this 2nd day of February, 1979.

ODELL HORTON
Odell Horton
Bankruptcy Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

NO. 79-2258

IN RE:

J & C COLOR INDUSTRIES, INC., *et al.*,

v.

WILLIAM M. BELL, JR. *et al.*,

v.

UNION PLANTERS
NATIONAL BANK OF MEMPHIS

Memorandum Decision

(FILED January 18, 1981)

Union Planters National Bank has appealed the decision of the Bankruptcy Judge, which required the Bank to pay certain funds to J & C Color Industries (J & C). After reviewing the bankruptcy proceedings and considering memoranda and oral argument before this Court, it is the decision of the Court that the findings of fact made by the Bankruptcy Judge are supported by the evidence, that his decision is correct as a matter of law and must be affirmed.

FACTS

Bell and Norfleet, a partnership composed of William M. Bell, Jr. and Everett Norfleet, began development of a 547 acre industrial park in Memphis, Tennessee, known as Hickory Hill Industrial Park (HHIP). Three banks participated in financing the project. Union Planters was the lead bank, having the day to day responsibility of overseeing the project's loans.

The banks held a properly recorded first mortgage lien on the 547 acre tract. The master mortgage contained a release

provision whereby the banks would release sold lots for 75 cents per square foot. J & C approached Bell and Norfleet about purchasing four of the lots [numbers 35, 36, 37, and 38]. Bell and Norfleet then had the idea that it would save property taxes by splitting the release fee into two parts. Forty cents per square foot would be the release fee for the lots. The additional 35 cents would be paid upon completion of the improvements to the lots. Bell and Norfleet came to an agreement with Union Planters that the banks would release the lots sold to J & C upon receipt of 40 cents per square foot. The total to be paid Union Planters in exchange for the release was $69,696. Bell and Norfleet then conveyed the lots by warranty deeds to J & C. Throughout the negotiations for the sale of these lots Union Planters was kept up to date on the progress of the sale. About six months after the sale was closed, Union Planters received the $69,696 from Bell and Norfleet, which it applied to reduce the entire mortgage debt of Bell and Norfleet rather than crediting to the purchase of lots by J & C. Union Planters had copies of the contracts for the sale and copies of the deeds. (Testimony of John David Guthrie, R. at 28.)

In November 1975 Bell and Norfleet defaulted on their loans. With leave of the Bankruptcy Court Union Planters foreclosed its trust deed on HHIP. The bank did not notify the Bankruptcy Court about the conveyance to J & C when it sought leave to foreclose, although J & C was apparently notified. The bank advised J & C that, if it were allowed to foreclose, J & C and the bank would resolve the problems with J & C's lots following the foreclosure. (Deposition of Edmund L. Brown, President and Chairman of the Board of J & C, March 3, 1978, p. 68.) Negotiations between J & C and the bank continued into the early part of 1977 without resolution. J & C filed suit in Chancery Court of Shelby County, Tennessee, against Union Planters, William Bell, Jr. and Everett Norfleet. Subsequently Bell and Norfleet were permitted to amend their schedules to reflect the disputed claim of J & C against them.

J & C also filed a complaint in the Bankruptcy Court wherein it alleged that Bell and Norfleet obtained money from it by false pretenses and misrepresentation. Bell and Norfleet, however, relied on the oral modification with Union Planters when it gave the warranty deeds to J & C. The Bankruptcy Court found that Bell and Norfleet did not intend to defraud J & C, but that their representations were made in reliance on the oral modification with Union Planters.

The Bankruptcy Court imposed a constructive trust on the proceeds (69,696) of the sale of the lots to J & C, and ordered Union Planters to pay to J & C the $69,696 which it received from Bell and Norfleet.

ISSUES ON APPEAL

Union Planters has designated nine issues on this appeal:

1. The Bankruptcy Court lacked subject matter jurisdiction to adjudicate any private third party controversies between Union Planters and J & C Color.

2. The finding by the Bankruptcy Judge that any controversies between Union Planters and J & C were presented, or that any cause of action was stated by J & C against Union Planters, or that any such issue was raised at any time during the hearings before him is clearly erroneous.

3. The findings by the Bankruptcy Judge that Union Planters explicitly or implicitly consented to the jurisdiction of the Bankruptcy Court to adjudicate any controversies between the bank and J & C is clearly erroneous.

4. The Bankruptcy Court lacked summary jurisdiction over the controversies between J & C and Union Planters, and that the bank has timely objected to such jurisdiction.

5. The Bankruptcy Judge clearly erred in permitting J & C to amend its pleadings pursuant to Rule 15(b), F.R.Civ.P.

6. The finding of the Bankruptcy Judge that Bell and Norfleet did not obtain money by means of false pretenses or

false representations and in violation of §17(a)(2) of the Bankruptcy Act is clearly erroneous.

7. The failure of the Bankruptcy Court to apply the statute of frauds, Tenn. Code Ann. § 23-201(4), to the alleged agreement to release lots 35, 36, 37, and 38 from the deed of trust is clearly erroneous.

8. The finding of the Bankruptcy Judge that the claim of J & C was not barred by laches is clearly erroneous.

9. The finding by the Bankruptcy Judge that the six-year statute of limitations, Tenn. Code Ann. § 28-309, applied to the cause of action of J & C was clearly erroneous, and the finding that the three-year statute of limitations, Tenn. Code Ann. § 23-305, did not apply is clearly erroneous.

THE BANKRUPTCY COURT HAD JURISDICTION OVER THE CONTROVERSY AMONG UNION PLANTERS, BELL AND NORFLEET, AND J & C

The jurisdiction of the Bankruptcy Court was created by 11 U.S.C. §11, which provides the Bankruptcy Court with jurisdiction over the debtor and his assets.

In aid of administering bankrupt's estates:

> [a] court of bankruptcy [has] jurisdiction and power to determine a controversy between third parties concerning the ownership of property in which neither the bankrupt nor the trustee has title if it is impossible to administer completely the estate of the bankrupt without determining that controversy.

O'Dell v. *United States*, 326 F.2d 451, 454 (2nd Cir. 1964). In *First State Bank* v. *Sand Springs State Bank*, 528 F.2d 350, 353 (10th Cir. 1976), the court restated the above rule. The question therefore presented by this appeal is whether the claim of J & C had to be resolved before the estates of the bankrupts could be completely administered.

It is necessary to trace the course of a portion of the bankruptcy litigation to illustrate the nexus of J & C's claim to the bankruptcy proceedings and to show the role of Union Planters therein.

In 1977, after J & C filed its suit in Chancery Court, the debtors, Bell and Norfleet, amended their schedules to show the disputed claim to J & C. Thereafter J & C filed a complaint against Bell and Norfleet in the Bankruptcy Court. A motion to intervene was filed by the Special Committee of Creditors joining Union Planters as a necessary party. In January 1978 Union Planters moved to dismiss the complaint of the Special Committee against it on the grounds that it was already a party to the J & C litigation in Chancery Court. In that motion Union Planters stated:

> that the issues and subject matter of the said Chancery Court lawsuit are the same as the Committee seeks to raise in this cause of action. Additionally, the relief sought in the Chancery Court proceedings is essentially the same as that sought by the Committee in its complaint against Union Planters.
>
> Union Planters is not the owner of the property which the Committee seeks to have Union Planters convey to J & C.

Union Planters further asserted the order of the Bankruptcy Court allowing it to foreclose its trust deeds. However, at no point did Union Planters apprise the Bankruptcy Court of the conveyances to J & C. The Court denied the motion of Union Planters, and then Union Planters moved the Court to enjoin the Chancery Court proceedings, stating.

> The parties, issues, subject matter and relief sought in the Chancery Court proceedings are essentially the same as are presently pending before this court in this cause. A Petition to Intervene by the special committee of creditors in the Chancery Court proceedings has been denied. Therefore, the interests represented by the special committees of creditors will not be protected in the Chancery Court proceedings, and Union Planters will be required to litigate the same issues in two separate forums in the event the plaintiffs and counter-defendants, J & C Colors, are not enjoined from proceeding further in the Chancery Court. All of the issues and claims involved arose prior to the filing of the Chapter XI petitions filed in this court, and this court has jurisdiction of, and may dispose of, all issues and claims between the parties hereto.

Now Union Planters asserts that the Bankruptcy Court did not have jurisdiction to order it to pay funds over to J & C. Apparently, Union Planters now would like to relitigate its liability to Bell, Norfleet and J & C in another forum.

While it is true that subject matter jurisdiction cannot be waived, *In Re Erie Lackawanna*, 563 F.2d 784 (6th Cir. 1977), the present case clearly mandates exercise of jurisdiction by the Bankruptcy Court because the ultimate liability of Bell and Norfleet and/or Union Planters had to be resolved in order to administer the estates of Bell and Norfleet.

The policy of the Bankruptcy Act to administer a bankrupt's estate expeditiously is best served by resolving interrelated issues in a single summary proceeding before the Bankruptcy Court. *In Re Eastern Freight Ways, Inc.*, 577 F.2d 175, 183 (2nd Cir. 1978). See also, *Commercial Discount Co.* v. *Rutledge*, 297 F.2d 370, 372-3 (10th Cir. 1961), in which the court said that jurisdiction is sustainable upon the equitable power of the court to grant complete relief between the parties before the Court.

An additional factor to be considered is that Union Planters failed to make the Bankruptcy Court aware of the transfers to J & C when it petitioned to foreclose its trust deeds even though it had actual knowledge of the conveyances. Union Planters responds by stating that J & C should be charged with the knowledge of the trust deeds that it would have obtained by means of a title search on HHIP. This argument was rejected by the Supreme Court of Tennessee in *McClure* v. *State*, 174 Tenn. 140, 146, 124 S.W. 2d 240, 241-2 (1939).

> We think it does not lie in the mouths of these defendants to say, that because, by their artifice, they inspired unmerited confidence, they are guiltless.

In the present case J & C relied on the representations of Bell and Norfleet, who in turn relied on the representations of Union Planters.

Union Planters also objects to the imposition of a constructive trust, and states that there has been no showing of fraud

or any unconscionable conduct on the part of the bank which would justify the imposition of a constructive trust. On the contrary, Union Planters was less than candid with the Bankruptcy Court when it petitioned that court for leave to foreclose its trust deeds on HHIP. It also represented to J & C that it would settle with them if allowed to proceed with the foreclosure. The bank's conduct in breaching its agreement with Bell and Norfleet to release the lots, which made Bell and Norfleet potentially liable for breach of warranties contained in the warranty deeds they gave J & C, cannot be characterized as above-board conduct. A constructive trust may be imposed in such a situation pursuant to the equity powers of the Bankruptcy Court in aid of its bankruptcy jurisdiction. *Sanders* v. *Forcum-Lannon, Inc.*, 225 Tenn. 637, 642, 475 S.W. 2d 172, 174 (1971), states the rule of constructive trusts:

> a constructive trust arises contrary to intention and in invitum, against one who, by fraud, actual or constructive, by duress or abuse of confidence, by commission of wrong, or by any form of unconscionable conduct, artifice, concealment or questionable means, or who in any way against equity and good conscience, either has obtained or holds the legal right to property which he ought not, in equity and good conscience, hold and enjoy.

The constructive trust imposed by the Bankruptcy Court operates to relieve Bell and Norfleet from liability for breach of the warranties contained in the deeds to J & C. It is apparent that Union Planters had no right to the money paid by J & C to Bell and Norfleet unless and until it executed the release deeds, which it never did.

The fact that the ultimate result runs from Union Planters to J & C does not demonstrate that the Bankruptcy Court was without jurisdiction over the controversy at its inception. In other words, it was impossible to know whether Bell and Norfleet or the bank, or both, were liable to J & C until the controversy was adjudicated. This Court agrees that the Bankruptcy Court did have jurisdiction over this controversy because of the direct relationship to the bankruptcy proceedings. Thus, issues 1 - 4 designated by Union Planters must be resolved against Union Planters.

ALLEGED ERROR OF BANKRUPTCY JUDGE BY ALLOWING J & C TO AMEND PLEADINGS

Rule 15(a) states that leave by the Court to amend a pleading shall be freely given when justice requires. Because it knew that J & C was asserting a claim against it in the Chancery Court, Union Planters has not been prejudiced. Further, Union Planters was on notice that Bell and Norfleet both asserted that Union Planters was primarily liable to J & C, by the complaints for reimbursement and alternative relief filed in the Bankruptcy Court against it by both Bell and Norfleet. In fact the complaint of Norfleet specifically alleges that:

> a warranty deed was accordingly given the purchasers, all in reliance upon the representations and promises to release made by the defendant, Union Planters National Bank.

The Bankruptcy Court had to determine whether Bell and Norfleet and/or Union Planters were liable to J & C. Amendment of the pleadings to conform to the issues as ultimately tried was proper under Rule 15 in the instant case.

THE FINDING OF THE BANKRUPTCY JUDGE THAT BELL AND NORFLEET DID NOT OBTAIN MONEY BY FALSE PRETENSES OR FALSE REPRESENTATIONS IS NOT CLEARLY ERRONEOUS

Findings of fact by a Bankruptcy Court will not be reversed unless they are clearly erroneous, *In Re Nelson & Sons, Inc.*, 426 F.2d 235, 236 (6th Cir. 1969). In the instant case the facts were controverted and the credibility of witnesses was a factor in the decision of the Bankruptcy Judge. Bankruptcy Rule 810 states that the District Court should give due regard to the opportunity of the referee to judge the credibility of the witnesses. It is the opinion of this Court that the Bankruptcy Judge was in an excellent position to judge the credibility of the witnesses, in view of the extensive hearings held in this cause, and that the facts as found by him are not clearly erroneous.

STATUTE OF FRAUD, STATUTES OF LIMITATIONS AND LACHES

Union Planters cannot assert the doctrine of laches as a defense to the claim of J & C because, as the Bankruptcy Court found, Union Planters did not inform the court of the warranty deeds to J & C and it thus remained silent at a time when it had a duty to speak. J & C cannot be guilty of laches because of its good faith attempt to settle this matter with Union Planters. For the same reason, Union Planters cannot invoke the statute of limitation to bar the recovery of J & C because the settlement negotiations were in progress. Additionally, the Bankruptcy Court was correct in applying the six-year statute contained in Tenn. Code Ann. § 28-309. *New York Life Insurance Co.* v. *Nashville Trust Co.* 200 Tenn. 513, 292 S.W. 2d 749 (1956).

The issue of the statute of frauds has not been addressed by Union Planters in this appeal further than as a designated issue. There is no basis for reversing the decision of the Bankruptcy Judge on this ground.

IT IS THEREFORE ORDERED that the decision of the Bankruptcy Court is affirmed. Enter, this 18th day of January 1980.

ROBERT M. MCRAE, JR., JUDGE
Robert M. McCrae, Jr., Judge

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

IN RE:

WILLIAM M. BELL, JR. AND
J. EVERETT NORFLEET,

Debtor,

J & C COLOR INDUSTRIES, *et al.*,

Appellee,

v.

UNION PLANTERS
NATIONAL BANK OF MEMPHIS,

Appellant.

Order

Before: EDWARDS, *Chief Judge,*
WEICK and KEITH, *Circuit Judges*

The plaintiffs originally filed a complaint in the Chancery Court of Shelby County naming as defendants, William M. Bell, Jr., J. Everett Norfleet and Union Planters National Bank of Memphis. The complaint was based on theories of constructive trust and misrepresentation and alleged that the defendants were jointly liable to the plaintiffs for selling the plaintiffs four lots in the Hickory Hills Industrial Park which were represented to be unencumbered, but which were actually subject to a deed of trust held by Union Planters.

Union Planters answered by denying any liability. Bell and Norfleet who had filed petitions in Bankruptcy Court, then filed complaints in Bankruptcy Court to enjoin the Chancery court proceedings. They also filed motions in Bankruptcy Court to amend their schedules to include the claim of the plaintiffs. On August 26, 1977, the Bankruptcy Court enjoined the Chancery Court proceedings, as against Bell and Norfleet, but allowed the plaintiffs to file complaints against Bell and Norfleet objecting to dischargability.

On September 23, 1977, the plaintiffs filed their complaints against Bell and Norfleet in Bankruptcy Court. The special committees of creditors were allowed to intervene for the purpose of assembling a claim for the cost of improvements on the four lots. Later, the committees filed an answer, counterclaim and complaint naming Union Planters as an additional party. Union Planters filed a motion to dismiss on January 20, 1978.

On May 26, 1978, Bell and Norfleet filed complaints in Bankruptcy Court against Union Planters seeking reimbursement and alternative relief. On that same day, Union Planters filed a motion to enjoin proceedings which stated in part:

> 3. All of the issues and claims involved arose prior to the filing of the Chapter XI petitions filed in this court, and this court has jurisdiction of, and may dispose of, all the issues and claims between the parties hereto.

On June 16, 1978, a hearing was held by the Bankruptcy Court on all pending pre-trial motions. On February 2, 1979, the court held that Bell and Norfleet had not obtained money or property from the plaintiffs by false pretenses or false representations within the meaning of Section 17(a)(2) of the Bankruptcy Act and were not liable to the plaintiffs for the return of the purchase price pursuant to the doctrine of constructive trust. The court then allowed the plaintiffs to amend their complaints to conform to the evidence produced at the hearing and to the relief granted by the court.

Amendments to the complaints were filed on February 7, 1979, and five days later, a judgment was entered against the Bank for $69,696 plus interest. Union Planters then filed a motion objecting to the bankruptcy court's jurisdiction. On appeal, the district court found jurisdiction in the Bankruptcy Court over the claim against the bank. The district court affirmed the bankruptcy court in all other respects, and Union Planters appeals this decision to this court. For the reasons discussed below, we affirm.

Bell & Norfleet, a partnership composed of William M. Bell, Jr. and J. Everett Norfleet, was the general partner in a 547 acre industrial park in Memphis, Tennessee known as Hickory Hills Industrial Park. In the spring of 1973, Hickory Hills Industrial Park obtained financing for the purchase and development of the industrial park from a group of three banks, Union Planters National Bank of Memphis, the lead bank, First National Bank of Boston and First National Bank of Miami.

As evidence of the agreement to finance the project, Union Planters issued a commitment letter to Hickory Hills Industrial Park dated May 16, 1973. The commitment letter contained a provision for the release of lots within Hickory Hills Industrial Park. Union Planters also acquired and recorded a deed of trust on the property as security for the loan.

In the summer of 1973, Edward L. Brown acting on behalf of J&C Color Industries, Inc. Profit Sharing Plan and J&C Color Industries, Inc. Pension Plan approached Jim Pirtle, a salesman for Bell & Norfleet Realty, Inc., about purchasing lots in Hickory Hills Industrial Park which were undeveloped at that time. Following initial conversations, Pirtle reported to Bell that he had a prospective buyer for lots 35, 36, 37 and 38, but that the prospective purchaser was unwilling to pay $.75 per square foot for the lots since they were undeveloped.

In order to sell the lots at that time without a property tax increase on the entire project, Bell immediately conceived a "plan" or "concept" whereby the purchase price of $.75 per square foot would be divided into $.40 per square foot for the undeveloped lots and $.35 per square foot for the improvements to be made on the lots. This was to be the first sale of lots in the park. Bell then called John David Guthrie at Union Planters and presented to him the "concept." Guthrie approved the "concept," advising Bell that "it was a good idea to go forward with that type thing" and that "it was a good way to accomplish what they were trying to do." According to

Bell, Guthrie agreed to release the lots for $.40 per square foot. Upon receiving approval of the "concept" from Union Planters and an agreement to release for $.40 per square foot, Bell advised Wilson Viar, house counsel for Bell & Norfleet, to go forward with the "plan" or "concept."

Two contracts were subsequently executed by the parties on or about August 16, 1973, and the purchasers paid to Bell & Norfleet Realty, Inc. the sum of $6,000 as earnest money. The total purchase price of the four lots was $69,696, based upon a purchase price of $.40 per square foot. The contracts also provided for the payment of $.35 for improvements to be made on lots and contained a $.14 penalty and interest provision to be applied in the event improvements were not made within a specified period of time.

John David Guthrie at Union Planters received copies of the contracts dated August 16, 1973, in October, 1973. The contracts provided that warranty deeds would be given at closing and further provided that the sale would be closed within 60 days from the date of the execution of the contracts. The sale was actually closed on January 4, 1974.

Subsequent to the execution of the contracts and prior to the closing on January 4, 1974, J&C Color loaned Bell & Norfleet $45,000 in cash on or about September 17, 1973. This amount with interest in the amount of $346.15 was allowed as a credit toward the "purchase price" for lots 36, 37 and 38.

Lots 35, 36, 37 and 38 conveyed to J&C Color on January 4, 1974, were encumbered by the deed of trust held by Union Planters. The warranty deeds received by J&C Color at the closing and recorded in the Registrar's Office of Shelby County, Tennessee on January 9, 1974, contained clauses warranting title to the lots to be "unemcumbered." A release deed was not prepared prior to the closing and none was presented at the closing. J&C Color was not represented by an attorney at the closing nor were they represented by an attorney at any stage of the proceedings leading up to the closing.

Guthrie was advised by Wilson Viar that the closing had taken place on January 4, 1974, within one or two weeks after the closing. Guthrie was only concerned with getting the money which he knew the purchasers had paid to Bell & Norfleet for the four lots. Guthrie also knew that warranty deeds had been given to the purchasers warranting that the lots were free and clear of all encumbrances while at the same time he knew that the bank held a deed of trust on the lots. Guthrie communicated with no one regarding what had occurred in the transaction. Thereafter, Guthrie made several demands on agents of Bell & Norfleet for the money paid by the purchasers for the four lots. Guthrie also made demand on Bell & Norfleet for an assignment of the improvements contract on the four lots. Guthrie knew by his own admission prior to receipt of the purchase price of $69,696 from Bell & Norfleet in June, 1974 that Bell & Norfleet wanted a release for $.40 per square foot.

In June, 1974, Guthrie received Bell & Norfleet's check for $69,696 dated June 6, 1974. Guthrie took the money and appropriated it to the bank's own use for the reduction of the loan to Hickory Hills Industrial Park knowing that the $69,696 represented the purchase price for the four lots and the proceeds of the sale and that Bell & Norfleet wanted a release of the lots for that amount.

Between January 4, 1974, and March 12, 1975, there was no formal written demand for a release of the lots. During this period of time, Bell & Norfleet began to encounter financial difficulty and this fact was known to the bank. Business relations between the bank and Bell & Norfleet were deteriorating and the bank stopped funding the Hickory Hills Industrial Park project in approximately August, 1974.

Between January 4, 1974, and October 11, 1975, Brown still had no knowledge of the existence of a deed of trust on the four lots. On June 4, 1975, Union Planters filed a complaint to remove stay against foreclosure in proceedings for arrangement involving Hickory Hills Industrial Park. On September

24, 1975, an order was entered by the Bankruptcy Court allowing foreclosure on Hickory Hills Industrial Park.

By letter of October 11, 1975, counsel for Union Planters advised Brown that the bank was foreclosing on the four lots pursuant to its deed of trust. Thereafter, conferences took place between counsel for Union Planters, counsel for Brown and Brown regarding the foreclosure and the possibility of resolving the matter by settlement. At first Union Planters denied that it had received the proceeds of sale. It then admitted that the proceeds had been received and applied against the loan to Hickory Hills Industrial Park. Brown was advised by the bank and its counsel that if the bank were allowed to foreclose, the matter would be resolved following foreclosure. The bank offered to convey title to the lots for the $.35 per square foot improvement cost. At a later time, the bank took the position that it was not obligated to honor the 14% penalty and interest charge contained in the contracts between the parties and that it was not obligated to complete improvements which Hickory Hills Industrial Park would have been obligated to complete under the terms and conditions of the contracts between the parties.

During 1976 and the early part of 1977, negotiations between the bank, Brown and his representatives continued without resolution of the matter. When it became evident that there would be no resolution of the matter a complaint was filed in the Chancery Court of Shelby County, Tennessee on May 10, 1977.

On appeal, Union Planters argues that Bankruptcy Court lacked jurisdiction below. The gravamen of the bank's argument is that since the dispute between Union Planters and the plaintiffs was a "private controversy" that did not "relate to matters pertaining to bankruptcy," the Bankruptcy Court had no jurisdiction over the dispute. We cannot agree. First, the controversy between the bank and the plaintiff was related to the "matters pertaining to bankruptcy." The bankrupts were allegedly jointly liable with Union Planters to the plaintiffs for

damages arising out of the controversy. Second, the plaintiffs' argument that Union Planters waived any objection to the court's jurisdiction has merit. In its motion to enjoin proceedings, Union Planters stated:

> 3. All of the issues and claims involved arose prior to the filing of the Chapter XI petition filed in this court, and this court has jurisdiction of, all the issues and claims between the parties hereto.

Under Rule 915 of the Bankruptcy Court this statement can properly be construed as a waiver of objection to jurisdiction.

The bank also argues that the plaintiffs lack standing, that the district court abused its discretion in allowing the plaintiffs to amend their complaint, and that the Bankruptcy Court's finding of liability against Union Planters was clearly erroneous. We find all of these contentions without merit.

Accordingly, the judgment of the district court upholding the ruling of Bankruptcy Court Judge Odell Horton is hereby affirmed.

ENTERED BY ORDER OF THE COURT

/s/ _____
Clerk

Opposition

Office - Supreme Court, U.S.
FILED
NOV 5 1981
ALEXANDER L. STEVAS
CLERK

No. 81-665

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

UNION PLANTERS NATIONAL BANK OF MEMPHIS,
Petitioner,

v.

J & C COLOR INDUSTRIES, INC., PROFIT SHARING PLAN; J & C COLOR INDUSTRIES, INC., PENSION PLAN; EDWARD L. BROWN, for the use and benefit of PLASTICOLOR UNLIMITED PROFIT SHARING PLAN, and EDWARD L. BROWN, and wife, ANN CALLAHAN BROWN,
Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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On Petition For A Writ Of Certiorari To The
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For The Sixth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

The respondents respectfully request that this Court deny the petition for certiorari seeking review of the Sixth Circuit's opinion in this case. That opinion, affirming the judgment of the District Court upholding the ruling of the Bakruptcy Court, is not reported. The opinion is set forth at page 27a of the petition.

STATEMENT OF THE CASE

Detailed statements of the facts of this case are contained in the opinions of the Bankruptcy Court, the District Court and the Sixth Circuit which are set forth in the appendix to the petition.

The respondents originally filed a complaint in the Chancery Court of Shelby County, Tennessee on May 10, 1977, naming as defendants, William M. Bell, Jr., J. Everett Norfleet and the petitioner. The complaint, based on theories of constructive trust and misrepresentation, alleged that the defendants were jointly liable to the respondents as a result of the respondents' purchase of the four lots in Hickory Hills Industrial Park in Memphis, Tennessee, which were represented to be unencumbered, but which were actually subject to the deed of trust held by the petitioner.

At the time of the filing of the complaint in the Chancery Court, Bell and Norfleet had filed petitions in Bankruptcy, and in June, 1977, they filed complaints in the Bankruptcy Court to enjoin the proceedings in the Chancery Court and motions for leave to amend their schedules since the claim of the respondents had not been listed in their original petitions in Bankruptcy. On August 26, 1977, the Bankruptcy Court enjoined the Chancery Court proceedings insofar as Bell and Norfleet were concerned and allowed them to amend their schedules so as to list the claim of the respondents as a disputed claim. The Bankruptcy Court also allowed the respondents to file complaints against Bell and Norfleet objecting to dischargeability.

On September 23, 1977, the respondents filed complaints in the Bankruptcy Court against both Bell and Norfleet alleging that they had obtained money or property from the respondents by false pretenses or false representations within the meaning of Section 17(a)(2) of the Bankruptcy Act. Attached to the complaints as exhibits were copies of the complaint filed by the

respondents and the answer filed by the petitioner in the Chancery Court. Answers were subsequently filed by Bell and Norfleet.

The special committees of creditors were allowed to intervene in both cases in the Bankruptcy Court for the purpose of asserting a claim for the cost of improvements on the four lots, and thereafter the special committees filed an answer, counterclaim and complaint on December 16, 1977, naming the petitioner as an additional defendant. On January 20, 1978, the petitioner filed a motion to dismiss the complaint of the special committees of creditors. The petitioner was the largest single creditor on both committees.

On May 26, 1978, both Bell and Norfleet filed complaints against the petitioner for reimbursement and for alternative relief. On the same date the petitioner filed a "Motion to Enjoin Proceedings" which stated:

> "COMES NOW the Union Planters National Bank of Memphis, (hereinafter referred to as "Union Planters"), and moves this court to enjoin the plaintiffs and counter defendants, J & C Color Industries Inc. Profit Sharing Plan, et al from proceeding further in cause number 83503-1 in the Chancery Court of Tennessee for the Tenth Chancery Division at Memphis. In support thereof, Union Planters would show and state as follows:
>
> 1. The parties, issues, subject matter and relief sought in the Chancery Court proceedings are essentially the same as are presently before this court in this cause.
>
> 2. A Petition to Intervene by the special committees of creditors in the Chancery Court proceedings has been denied. Therefore, the interests represented by the special committees of creditors will not be protected in the Chancery Court proceedings, and Union Planters will be required to litigate the same issues in two separate forums

in the event the plaintiffs and counter defendants, J & C Colors, are not enjoined from proceeding further in the Chancery Court.

3. All of the issues and claims involved arose prior to the filing of the Chapter XI petitions filed in this court, and this court has jurisdiction of, and may dispose of, all the issues and claims between the parties hereto.

WHEREFORE, PREMISES CONSIDERED, Union Planters moves this court to enjoin the plaintiffs and counter defendants, J & C Colors, from proceeding further in cause number 83503-1 which is presently pending in the Chancery Court of Tennessee for the Tenth Chancery Division at Memphis."

On June 16, 1978, a hearing was had by the Bankruptcy Court on all pending pre-trial motions, and an order on motion for summary judgment or in the alternative to dismiss and on objection to demand for jury trial was entered in both cases on June 26, 1978. The petitioner's motion of January 20, 1978, to dismiss the complaint of the special committees of creditors and its motion of May 26, 1978, to enjoin proceedings were not disposed of prior to trial.

On July 18, 1979, the petitioner filed an answer to the complaints of Bell and Norfleet. Thereafter, both cases were tried before the Honorable Odell Horton, Bankruptcy Judge. All the issues and claims between the parties were tried in the Bankruptcy Court. During the course of the trial, all parties, including the petitioner, participated fully in the proceedings.

Following trial, post-trial briefs were filed with the Bankruptcy Court by all parties. The respondents argued in their brief that Union Planters was jointly liable with Bell and Norfleet, and Bell and Norfleet suggested in their briefs that the Bankruptcy Court might resolve the entire matter by holding the petitioner directly liable to the respondents based on a constructive trust.

On February 2, 1979, Judge Horton filed a memorandum opinion holding that in view of the proof presented at the trial, Bell and Norfleet had not obtained money or property from the plaintiffs by false pretenses or false representations within the meaning of Sectin 17(a)(2) of the Bankruptcy Act and, therefore, they were not liable to the respondents. However, Judge Horton also held that the petitioner was liable to the respondents for the return of the purchase price pursuant to the legal doctrine of constructive trust. Judge Horton permitted the respondents to amend their complaints to conform to the evidence produced at trial and to the relief granted by the Court in accordance with Rule 15(b) of the Federal Rules of Civil Procedure.

Amendments to the complaints were filed on February 7, 1979, and on February 12, 1979, a judgment was entered by the Bankruptcy Court providing that the respondents should have and receive of the Union Planters National Bank of Memphis the sum of $69, 696 together with interest thereon from the date of foreclosure by the petitioner on the four lots in Hickory Hills Industrial Park. On the same date, the petitioner filed a motion to strike amendments to complaints and objecting to jurisdiction. Prior to this time, the petitioner had not objected to the Bankruptcy Court's jurisdiction and this motion was inconsistent with the petitioner's motion of May 26, 1978, set forth above.

On February 20, 1979, the petitioner filed a notice of appeal to the District Court and in view of the filing of the notice, the Bankruptcy Court entered an order on motion to strike amendment to complaint and objection to jurisdiction on February 27, 1979, providing that the issues raised in the petitioner's motion should be decided on appeal to the District Court.

Briefs were filed in the District Court and oral arguments were heard by the District Judge. Thereafter, on January 18, 1980, Judge Robert M. McRae, Jr. filed a memorandum deci-

sion affirming the decision of the Bankruptcy Court in all respects.

The petitioner appealed the decision of the District Court to the Sixth Circuit which affirmed the judgment of the District Court upholding the ruling of the Bankruptcy Court. The case is now before this Court on petition for a writ of certiorari.

REASONS WHY THE WRIT SHOULD BE DENIED

1. The Bankruptcy Court Had Jurisdiction Over The Petitioner, And The Petitioner Consented To The Bankruptcy Court's Jurisdiction.

In this case complaints were filed by the respondents to determine the dischargeability of a debt for which Bell and Norfleet were jointly liable with the petitioner. Attached to the complaints filed in the Bankruptcy Court as exhibits were copies of the complaint filed by the respondents and the answer filed by the petitioner in the Chancery Court of Shelby County, Tennessee.

The proceeding before the Bankruptcy Court was an "adversary proceeding" as defined in Rule 701 of the Bankruptcy Rules which provides:

> "The rules of this Part VII govern any proceeding instituted by a party before a bankruptcy judge to (1) recover money or property, other than a proceeding under Rule 220 or Rule 604, (2) determine the validity, priority, or extent of a lien or other interest in property, (3) sell property free of a lien or other interest for which the holder can be compelled to take a money satisfaction, (4) object to or revoke a discharge, (5) obtain an injunction, (6) obtain relief from a stay as provided in Rule 401 or 601, or (7) *determine the dischargeability of a debt.* Such a proceeding shall be known as an adversary proceeding." (emphasis added).

Objections to jurisdiction in "adversary proceedings" in the Bankruptcy Court are governed by Rule 915 of the Bankruptcy Rules which provides:

> "(a) *Waiver of objection to jurisdiction.* Except as provided in Rule 112 and subject to Rule 928, a party waives objection to jurisdiction of an adversary proceeding or a contested matter and thereby consents to such jurisdiction if he does not make objection by a timely motion or answer, whichever is first served.
>
> (b) ...." *See* 11 U.S.C. 11(a)(7) (1966).

The petitioner participated in all preliminary proceedings and was formally named a defendant by the special committees of creditors on December 16, 1979, and a third-party defendant on May 26, 1978, when complaints for reimbursement and for alternative relief were filed by Bell and Norfleet. Third party practice in the Bankruptcy Court is governed by Rule 719 of the Bankruptcy Rules which provides in part as follows:

> "(a) *Persons to be Joined if Feasible.* A person who is subject to service of process shall be joined as a party in the proceeding if (1) in his absence complete relief cannot be accorded among those already parties, or (2) he claims an interest relating to the subject of the proceeding and is so situated that the disposition of the proceeding in his absence may (i) as a practical matter impair or impede his ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest. If he has not been so joined, the court shall order that he be made a party. If he should join as a plaintiff but refuses to do so, he may be made a defendant, or, in a proper case, an involuntary plaintiff.

(b) *Objection to Jurisdiction by Joined Person.* If a person joined under subdivision (a) hereof makes a timely objection as provided in Rule 915 to the jurisdiction of the court to determine issues affecting his interest and the objection is sustained, the court shall dismiss such person from the proceeding or, pursuant to Rule 915(b), transfer the part of the proceeding involving his interest to the civil docket of the district court.

(c) ....

(d) ....

(e) ...." *See* 11 U.S.C. 11(a)(6) (1966).

Rather than objecting to the jurisdiction of the Bankruptcy Court, the petitioner chose to rely upon its "Motion to Enjoin Proceedings" filed in the Bankruptcy Court on May 26, 1978. In that motion the petitioner made the following statements:

"....

1. The parties, issues, subject matter and relief sought in the Chancery Court proceedings are essentially the same as are presently before this Court in this cause.

2. A Petition to Intervene by the special committees of creditors in the Chancery Court proceedings has been denied. Therefore, the interests represented by the special committees of creditors will not be protected in the Chancery Court proceedings, and Union Planters will be required to litigate the same issues in two separate forums in the event the plaintiffs and counter defendants, J & C Colors, are not enjoined from proceeding further in the Chancery Court.

3. All of the issues and claims involved arose prior to the filing of the Chapter XI petitions filed in this Court and this Court has jurisdiction of, and may dispose of, all the issues and claims between the parties hereto.

...."

2. The Decision Of The Sixth Circuit In This Case Is Not In Conflict With The Decision Of The Tenth Circuit Relied Upon By The Petitioner.

The petitioner seeks to have this Court grant the petition for certiorari on the ground that the decision of the Sixth Circuit is in conflict with the decision of the Tenth Circuit in the case of *First State Bank, etc.* v. *Sand Springs State Bank,* 528 F.2d 350 (10th Cir. 1976). In that case the Tenth Circuit held that the controversy presented to the Bankruptcy Court was essentially one between banks asserting conflicting claims to funds represented by certificates of deposit in which the trustee claimed no interest. In holding that the Bankruptcy Court had no jurisdiction to determine that controversy, the Tenth Circuit said:

> "With this background we must now determine whether the Court had subject matter jurisdiction. A court of bankruptcy cannot entertain jurisdiction of a private controversy which does not relate to matters pertaining to bankruptcy. *Associated Electronic Supply Co. of Omaha* v. *C.B.S. Electronic Sales Corporation,* 288 F.2d 683 (8th Cir. 1961). In the same vein, a bankruptcy court lacks jurisdiction of a controversy solely and exclusively between third parties which does not involve, directly or indirectly, the bankrupt or its property. *Central States Corp.* v. *Luther,* 215 F.2d 38 (10th Cir. 1954); *O'Dell, supra.* Furthermore, a bankruptcy court ordinarily lacks jurisdiction of a controversy between parties over a matter in which the trustee asserts no interest. *In re Burton Coal Co.,* 126 F.2d 447 (7th Cir. 1942)." *Id.* at 353.

It is respectfully submitted that the adversary proceeding before the Bankruptcy Court in this case met each of the tests set forth in the foregoing statement for the exercise of jurisdiction by a Bankruptcy Court for the following reasons:

1. This was not a "private controversy" between third parties. This case involved issues and claims between the respondents, the bankrupts, the creditors committees and the petitioner. It is significant that the petitioner was initially made a party to the proceeding by the creditors committees and the bankrupts.

2. The controversy in this case clearly related to "matters pertaining to bankruptcy." One important issue before the Court was the issue of dischargeability. Another issue was the petitioner's conduct at the earlier foreclosure proceedings in the Bankruptcy Court when it chose not to mention the transaction with the respondents of which it had full and complete knowledge. Other issues were the liability of the petitioner to the creditors committees for improvement costs, the possible return of the four lots to the respondents and the liability of the petitioner to the bankrupts.

3. This was a controversy which directly involved the bankrupts. The Bankruptcy Court was called upon to determine the dischargeability of the claims of the respondents and liability for improvement costs on the four lots. Whether the claims of the respondents were dischargeable depended upon whether the petitioner was liable to the respondents.

4. This was not a controversy between parties over a matter in which the special committees of creditors asserted no interest. They filed an answer, a counterclaim and a complaint against the petitioner and the respondents seeking to recover improvement costs on the four lots and to require the petitioner to return the lots to the respondents.

The Bankruptcy Court properly exercised its equity jurisdiction in this case in making a complete determination of the matter in controversy. For these reasons, it is respectfully submitted that the petitioner was correct in stating in its motion of May 26, 1978, that the Bankruptcy Court "... has jurisdiction of, and may dispose of, all the issues and claims between the parties hereto."

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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